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IN THE

Supreme Court of the United States

October Term, 1963

RICHARD I. POWELL,

Petitioner,

—v.—

EDWARD S. SILVER, District Attorney, Kings County, State of New York,

Respondent.

In the Matter of the Application of the District Attorney of the County of Kings, for an Order Adjudging Richard I. Powell, a Witness before the Second Additional October, 1963 Grand Jury, to be in Criminal Contempt of Court because of his wilful and contumacious refusal to testify before the said Grand Jury.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, OR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

MAURICE EDELBAUM
Attorney for Petitioner,
Richard I. Powell
250 Broadway
New York, New York

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, OR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, SECOND DEPARTMENT

Petitioner, Richard I. Powell, prays that a writ of certiorari issue to review a certain order or orders of the Court of Appeals of the State of New York entered in the above entitled case as further described *infra:* or, should such be jurisdictionally more appropriate, to review a certain order of the Appellate Division, Second Department, Supreme Court of the State of New York, which has also been entered in the above entitled case and which is likewise further described *infra.*

Opinions Below

None of the three State Courts below rendered a formal opinion. The oral statement of the reasons for decision given by the Supreme Court of the State of New York, Kings County (Honorable Miles F. McDonald, Justice), in adjudicating petitioner guilty of criminal contempt of court, is not reported but is printed in petitioner's separately bound "Special Appendix to Petition for Certiorari" * herein at pages A-64 to A-66. The Appellate Division, Second Department, of the Supreme Court of the State of New York, in affirming the conviction, rendered no opinion (Sp. App. pp. A-79 to A-81). The Court of Appeals of the State of New York, in denying leave to appeal, likewise rendered no opinion (Sp. App. p. A-97). As explained *infra*, there is probably still forthcoming in this case a further order by the Court of Appeals of the State of New York dismissing certain further appeal proceedings which petitioner is presently invoking in that Court under a theory of appeal as of right.

Jurisdiction

The order of the Supreme Court of the State of New York, committing the petitioner Richard I. Powell for criminal contempt of court was entered November 13, 1963 (Sp. App., p. A-70). Petitioner filed timely notice of appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, on November 13, 1963 (*id.*, p. A-77). The Appellate Division on December 30, 1963 af-

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* Cited herein as "Sp. App. p. ". One copy of the "Special Appendix" constitutes the certified record of the proceedings below, to be filed herewith. Nine additional copies of said "Special Appendix" are also filed herewith.

firmed the order of the Supreme Court, Kings County, which had committed petitioner for criminal contempt (*id.*, p. A-79). Applications for leave to appeal (*id.*, p. A-82) to the Court of Appeals of the State of New York from the Appellate Division's order of affirmance was denied by the Court of Appeals on January 23, 1964 (*id.*, p. A-97).

In order to eliminate any possible doubt that every available State procedural avenue for further review shall have been thoroughly exhausted for the purposes of meeting the jurisdictional requirements of the certiorari procedure in this Court, petitioner on January 21, 1964, subsequent to the filing of petitioner's prior motion for leave to appeal to the Court of Appeals of the State of New York, filed a notice of appeal to the latter Court on the theory that such appeal might be taken as of right pursuant to §5601(b)(1) of the New York Civil Practice Law and Rules (*id.*, p. A-100). This latter appeal to the Court of Appeals of the State of New York is still pending, it being anticipated that the within respondent District Attorney will move in the immediate future to dismiss said appeal and that the Court of Appeals will grant such motion for dismissal, in expected conformity with the above mentioned order of that Court which denied leave to appeal.

As of the time of the filing of this petition for certiorari, then, there exists a possible jurisdictional imperfection, i.e., if the New York State appeal avenue which we are pursuing *via* our above mentioned notice of appeal under a theory of appeal as of right needs to be exhausted in order to perfect our jurisdictional position for a certiorari application in this Court, the matter is not yet jurisdictionally ripe. We have nevertheless been obliged to file this certiorari petition at this time because the above mentioned

order of the Court of Appeals (January 23, 1964) denying leave to appeal was accompanied by a stay of execution of the judgment of commitment for criminal contempt, and this stay was limited to thirty days, which expire February 22, 1964 (*id.*, A-98). As soon as our pending appeal to the New York Court of Appeals (the above mentioned appeal which we have taken on the theory of appeal as of right) is disposed of by that Court, we shall file in this Court a supplement or amendment to this petition for certiorari (together with the necessary supplemental record) in order to complete the jurisdictional picture for consideration by this Court.

In the meantime, we respectfully pray that this Court defer final action on this petition for certiorari until such completion of the jurisdictional picture is had; this is not expected to entail any substantial delay.

Because the only action which has thus far been taken in this case by the highest Court of the State of New York, the Court of Appeals, is the denial of leave to appeal as aforesaid, and because the expected forthcoming order of that Court dismissing the appeal which we have taken to that Court under a theory of appeal as of right will likewise presumably not partake of a review on the merits of the Appellate Division's order of affirmance of the commitment for criminal contempt, this case comes before this Court in a perhaps uncertain jurisdictional posture as respects the question of whether the "final judgment" here to be reviewed is the order of the Court of Appeals (January 23, 1964) denying leave to appeal (*id.*, p. A-97) or the order of the Appellate Division affirming the order of commitment for criminal contempt (*id.*, p. A-79). It is this possible uncertainty which has prompted us to struc-

ture this petition for certiorari as seeking review, alternatively, of one or the other of the two last mentioned orders below. The supplement or amendment to this petition for certiorari which we plan to file, as above mentioned, as soon as the jurisdictional picture becomes complete in regard to our pending appeal in the Court of Appeals which we have filed on a theory of appeal as of right, will contain the necessary additional information, if any, which may bear upon the question of what is the "final judgment" herein.

The jurisdiction of this Court is invoked under 28 U.S.C. §1275(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fifth-and-Fourteenth-Amendment self-incrimination and due process, and Sixth-and-Fourteenth-Amendment jury trial), and under certain statutes (as recited *infra*) of the United States which would affect the issue of self-incrimination in a Federal-State aspect; and since there is necessarily drawn in question the validity of a State statute (Penal Law of the State of New York, §2447—immunity) on the ground of its being repugnant to the Constitution of the United States.

Questions Presented

Petitioner, the head of a large building construction company which specializes in building one-and-two-family residences, was questioned by a State grand jury about alleged bribery of State or municipal building inspection officials, and petitioner refused to answer on grounds of self-incrimination, whereupon he was given immunity under a State statute and was thereafter convicted of criminal

contempt and sentenced to fine and imprisonment for his continued refusal to answer the Grand Jury's questions. This particular Grand Jury sector of the case is only part of a larger overall picture of State and Federal inquisition directed against petitioner in connection with alleged improprieties regarding both Federal and State building or housing officials, including (1) questioning by another State grand jury, (2) questioning by a Federal grand jury, (3) prosecution (and conviction) under a State indictment for "grand larceny" and "false pretenses" upon charges of deceitfully selling a house which had an allegedly defective sewer installation and allegedly false or deceitfully obtained building inspectors' approvals, and (4) intensive cooperation between Federal and State prosecutive officials directed against petitioner in regard to the foregoing. The questions are:

1. Does the Federal Constitution permit a State Grand Jury to confer immunity without covering Federal incrimination? Is not the meritoriousness of this question, for certiorari purposes, indicated by this Court's having granted certiorari in *Murphy and Moody* v. *The Waterfront Commission of New York Harbor* (No. 138, Oct. Term, 1963) and in *Malloy* v. *Hogan* (No. 110, Oct. Term, 1963), and by the Court's having scheduled the latter two cases to be argued conjointly early in this coming March? Was the purported grant of immunity in this case valid in view of the express exclusion of any grant of immunity against Federal incrimination, and does not this case present—along with the *Murphy-Moody* and *Malloy* cases, *supra*—a proper occasion for abrogation of the ruling in *Knapp* v. *Schweitzer*, 357 U.S. 371, approving a State grant of im-

munity even though Federal incrimination might result as well as perhaps also a proper occasion for overruling *Twining* v. *New Jersey*, 211 U.S. 78 (allowing the State to compel self-incrimination despite the Fifth and Fourteenth Amendments)?

2. Was the proffered immunity in this case federally unconstitutional in any event because of the cooperation between State and Federal crime enforcement officials, within the meaning of the reservation for such situations in *Knapp* v. *Schweitzer* (357 U.S. at p. 380)?

3. Was the proffered immunity federally unconstitutional by reason of its impingement upon the situation surrounding the petitioner's prior State Court conviction for grand larceny and false pretenses which is presently being appealed?

4. Was petitioner entitled by the Federal Constitution to a jury trial of the State charges of criminal contempt?

Statutes and Constitutional Provisions Involved

The issues of self-incrimination and due process in the case involves the Fifth and Fourteenth Amendments of the United States Constitution; the jury trial issue involves the Sixth and Fourteenth Amendments.

The State criminal contempt proceedings herein were brought pursuant to the Judiciary Law of the State of New York, §750. The purported conferral of immunity upon the petitioner was pursuant to the Penal Law of the State of New York, §2447. These statutes are quoted in the Appendix to this petition for certiorari, *infra*. The Federal statutes

as to which petitioner claims that the within State grand jury interrogation and immunity proceedings subjected him to Federal incrimination are cited and discussed *infra*.

Statement of the Case and of how the Federal Questions Are Presented*

On October 21, 1963 petitioner was questioned by a grand jury of Kings County, New York, concerning alleged bribes to State building inspection officials, in connection with housing constructed by petitioner's company (Sp. App., pp. A-1 to A-7). Petitioner refused to answer these questions, invoking his privilege against self-incrimination (*ibid*). Thereupon the Grand Jury purported to confer upon petitioner immunity pursuant to N.Y. Penal Law, §2447 (*id.*, p. A-5). Petitioner thereupon inquired of the Grand Jury whether this immunity would protect him against Federal prosecution, and he was advised by the Assistant District Attorney, Mr. Koota, that it would not (*id.*, p. A-6). Petitioner also inquired whether the immunity would affect a conviction which had shortly theretofore (September 6, 1963) been rendered against him upon a jury verdict** of guilt of grand larceny in the first degree (by false representations) and obtaining property by false pretenses (*ibid*); these latter criminal proceedings against

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* The State criminal contempt proceedings from which this certiorari application derives did not produce any printed record or "appendix" in the appellate courts below, because the matter was processed throughout the state appellate proceedings upon the original papers on file. For the purposes of this certiorari proceeding petitioner has printed, in the form of the earlier mentioned "Special Appendix", the entire relevant text of the certified transcript of the original record in the proceedings below.

** Which had been rendered earlier in the year 1963.

petitioner arose out of charges by a purchaser of one of the houses built by petitioner's company that petitioner had concealed the existence of a certain disapproved sewer installation*. The Assistant District Attorney replied that if the aforesaid conviction were reversed on appeal and petitioner were ordered to a new trial on the same indictment then the immunity would apply, but that if the conviction were affirmed on appeal the immunity would be inapplicable (*ibid*). Petitioner thereupon continued his refusal to answer the Grand Jury's questions (*id.*, p. A-7).

It is especially important to note also, as a part of the background of petitioner's alleged contempt in the grand jury situation here being described, that at the time of petitioner's grand jury appearance he knew or in good faith believed that there had been some information transmitted or shown by the office of the District Attorney of Kings County to the office of the United States Attorney of the Eastern District of New York which purported to show that the petitioner had paid bribes to public officials (state and federal) in connection with the home building operations

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* Petitioner's conviction in the prosecution above referred to is presently on appeal to the Appellate Division of the New York Supreme Court. The central issue in that appeal is whether petitioner was unjustly convicted of felonious crime (in a situation which amounted at most to a typical municipal "building code" violation) in view of the Trial Court's refusal to let the Jury consider the undisputed trial proofs that the sewer line troubles were caused by the City of New York's own defective sewer system and that petitioner sincerely believed the City was remedying these defects (which was in fact also undisputedly true); in short the main issue in the criminal prosecution for grand larceny etc. is whether petitioner was denied a fair trial by the Trial Court's refusal to let the Jury pass in any realistic sense on the issue of petitioner's criminal intent. See *People* v. *Richard I. Powell* and *Donven Realty Corp.*; Indictment #3048-1962, S. Ct. of N. Y. Kings Co., presently on appeal to S. Ct. of N. Y. App. Div., 2d Dept.

of his company in Brooklyn; also, in April, 1963 the petitioner had appeared as a witness before a Federal Grand Jury in the Eastern District of New York pertaining to that same or to a related subject matter; in the latter Federal Grand Jury proceeding the petitioner had invoked the Fifth Amendment privilege against self-incrimination and he was excused by the Federal Grand Jury (*id.*, pp. A-19 to A-23). Additional facts pertaining to the subject of this paragraph are recited *infra*.

On October 22, 1963, which was the day after petitioner's grand jury appearance, petitioner was cited for contempt by an order to show cause issued by the Supreme Court of New York, Kings County, Hon. Miles F. McDonald, *J.*, pursuant to §750 of the Judiciary Law of the State of New York (quoted in the Appendix hereto *infra*); the order to show cause is printed in Sp. App., p. A-8.

The petitioner filed an answer to the aforesaid contempt citation in the form of an affidavit, denying contumacious intent and averring, *inter alia*, that he feared Federal incrimination if he were forced to answer the aforementioned questions before the Kings County Grand Jury (*id.*, pp. A-16 *et seq.*). The petitioner also requested a judicial trial in the manner of a criminal trial of the issue of his guilt or innocence, and he requested a jury trial of the charge of criminal contempt (*ibid*).

The contempt trial was held on November 7, 1963 (*id.*, p. A-34), the request for jury trial having previously been denied, to which exception was duly taken (*id.*, p. A-30). Testimony taken from Raymond Bernhard Gruenwald, Assistant United States Attorney in the Eastern District of New York, Aaron E. Koota, Chief Assistant District Attor-

ney of Kings County, and Irving P. Seidman, Assistant District Attorney of Kings County, established that the office of the District Attorney of Kings County had in fact sought out the United States Attorney for the Eastern District of New York many months prior to petitioner's Kings County Grand Jury appearance in October, 1963, for the purpose of supplying to the United States Attorney information and documents obtained under a search warrant by the Kings County District Attorney which allegedly indicated the payment by the petitioner of bribes to Federal housing officials; that the United States Attorney had been in possession of this information at the time of petitioner's appearance before the Federal Grand Jury as aforesaid; that agents of the Federal Bureau of Investigation had conferred upon this subject with representatives of the Kings County District Attorney's office, along with representatives of the United States Attorney's office; and that, apparently, additional information relating to this cooperation between the Federal and State prosecutive officials was in the possession of the Federal officials but would not be disclosed by them in the within State Court contempt proceedings before Mr. Justice McDonald on the ground of confidential Federal privilege to refuse to disclose the contents of criminal prosecution files of the United States Department of Justice (*id.*, pp. A-36 to A-57).

Petitioner, taking the stand in the contempt trial, denied any contumacious intent and swore that he feared Federal incrimination (*id.*, pp. A-58 *et seq.*).

It was urged in a memorandum of law on behalf of petitioner in said contempt trial that the indications in this

record of collaboration between the Federal and State prosecutive officials with a view to incriminating petitioner justified him in declining the proffered State immunity by reason of its failure to immunize him against Federal incrimination, petitioner invoking the authority of *Knapp* v. *Schweitzer*, 357 U.S. 371, where the Court, although approving a State grant of immunity even though Federal incrimination might result, did also expressly reserve the case of an actual Federal-State cooperative effort at incrimination. Petitioner in his aforesaid memorandum also brought to the attention of the Court in this contempt trial that on October 14, 1963 this Court had granted certiorari in the case of *Murphy and Moody* v. *New York Harbor Waterfront Commission* (Oct. Term 1963, No. 138), the principal question in the *Murphy-Moody* case being whether purported State grants of immunity were valid notwithstanding express exclusion of immunity against Federal incrimination and notwithstanding the indicated probability of Federal-State collaboration in the incrimination situation presented; that included in *Murphy-Moody* was the question of whether *Knapp* v. *Schweitzer*, 357 U.S. 371 (approving a State grant of immunity even though Federal incrimination might result) should be over-ruled; and that the grant of certiorari in the *Murphy-Moody* case was significant for still another reason pertinent to the instant situation, namely, that this Court had set down the *Murphy-Moody* certiorari to be argued concurrently with *Malloy* v. *Hogan* (Oct. Term 1963, No. 110), the *Malloy* case involving the historic constitutional issue of whether the Fifth Amendment self-incrimination provision applies directly to the States through the Fourteenth Amendment.

Mr. Justice McDonald (in the contempt trial herein) held that the rule of *Knapp* v. *Schweitzer* which permits state immunity without protection against Federal incrimination, being as yet unreversed by this Court, was applicable to the instant case notwithstanding the grant of certiorari in the *Murphy-Moody* Case. Mr. Justice McDonald also ruled that State Grand Jury evidence in this matter may not be disclosed to any Federal Grand Jury without a court order. Mr. Justice McDonald also held that the reservation in the *Knapp* case as to instances of Federal-State collaboration was likewise inapplicable here because such collaboration was not established by the testimony in the instant contempt trial. Mr. Justice McDonald noted, in the latter connection, that he was powerless to force the Federal-official witness to disclose further contents of the Federal files or records relating to this case. See Sp. App., pp. A-64 to A-66. Mr. Justice McDonald found petitioner guilty of criminal contempt of court and sentenced him to be imprisoned in the New York City Civil Jail for a term of thirty days, and in addition thereto, to pay a fine of $250.00 and to be imprisoned for a term of thirty days additional in the event that he fail to pay the fine (*id.*, A-70).

The execution of this sentence was stayed pending appeal, and it has remained so stayed down to the present time.

As recited under the heading "Jursidiction", *supra*. petitioner appealed the order of commitment for criminal contempt to the Appellate Division of the Supreme Court, Second Department (*id.*, p. A-77). That Court affirmed the order of commitment, without opinion (*id.*, A-79 to A-81). As also previously recited, the Court of Appeals

of the State of New York denied, without opinion, leave to take a further appeal (*id.*, p. A-97). Petitioner's further effort to take a State Court appeal by proceeding under a theory of appeal as of right in the Court of Appeals of the State of New York (*id.*, p. A-100) continues not yet disposed of, as likewise earlier recited.

Petitioner's presentation, in his aforementioned appeal to the Appellate Division, and in the proceedings upon his application for leave to appeal to the Court of Appeals, included a typewritten "Brief for Appellant"; the same brief was used for this purpose by petitioner in both of the latter State courts. We quote the "Statement of Questions Involved" and the "Point" headings of the Argument in that typewritten brief:

> "*Statement of Questions involved*
>
> 1. Do the Federal and State Constitutions permit a State Grand Jury to confer immuntiy without covering Federal incrimination?
>
> 2. Is the proffered immunity in this case unconstitutional in any event because of the cooperation between State and Federal crime enforcement officials, within the meaning of the reservation for such situations in *Knapp* v. *Schweitzer* (357 U.S. at p. 380)?
>
> 3. Do the interests of justice and of sound judicial process call for the postponement of the decision of this appeal, and continuation of the stay of execution of sentence, until after the Supreme Court of the United States shall have decided the cases of *Murphy* v. *New York Harbor Waterfront Commission* and *Malloy* v. *Hogan*?
>
> 4. Is the proffered immunity unconstitutional by reason of its impingement upon the situation sur-

grounding the appellant's prior conviction for grand larceny which is presently being appealed?

5. Was appellant constitutionally entitled to a jury trial of the charges of criminal contempt?"

The Points of petitioner's argument in his aforementioned brief in the State appellate courts below were captioned as follows:

"Point I

In the interests of justice and of a judicially sound and properly informed determinationof the important question of constitutional law presented—viz., the question of the validity of State conferred immunity which does not cover Federal incrimination —[said question] should not be decided by this Court until after the Supreme Court of the United States has decided the cases of *Malloy* v. *Hogan* and *Murphy* v. *New York Harbor Waterfront Commission.* It would be a denial of essential justice, if not of due process of law, to affirm the instant contempt conviction without awaiting a decision by the Supreme Court of the United States in the latter two cases, because appellant may be required to serve out his full sentence only to find afterwards that the existing doctrine allowing State immunity without covering Federal incrimination (Knapp v. Schweitzer, 357 U.S. 371) has meanwhile been overruled by the highest court of the land."

"Point II

The overall unfairness of the District Attorney's attempts to incriminate the appellant and now to jail him for contempt is intensified by the following:— The proffered State immunity is constitutionally ineffectual insofar as it fails to cover, of insofar as it obscures and confuses, appellant's privilege

against self-incrimination with respect to the charges of grand larceny under which he has been convicted and is presently prosecuting an appeal."

"Point III

Appellant was entitled to a jury trial of the charge of criminal contempt."

These same points were in essence presented to the Court of Appeals in petitioner's motion papers for leave to appeal (Sp. App., pp. A-84 *et seq.*).

Reasons for Granting the Writ

1. The pendency before this Court at the present time of No. 110 (Malloy v. Hogan) and No. 138 (Murphy and Moody v. The Waterfront Commission of New York Harbor), wherein certiorari has been granted and oral argument is to be had (we are informed) early in March of this year, affords to us our prime ground for requesting certiorari in the instant case of petitioner Richard I. Powell. Petitioner Powell's case presents exactly the same issues as does the *Murphy-Moody* case in regard to the constitutionality of a State conferral of immunity which expressly excludes immunity against Federal prosecution, except that our case is even stronger than the *Murphy-Moody* case as respects the reservation in *Knapp* v. *Schweitzer*, 357 U.S. 371, where the Court reserved future situations presenting the problem of Federal-State collaboration in crime-enforcement. If the reason for the granting of certiorari in *Murphy-Moody* was that this Court is disposed to reconsider the primary ruling of *Knapp* v. *Schweitzer* (which approved a State grant of immunity even though Federal in-

crimination might result), then we submit in all respectfulness that the same reason for granting certiorari exists in our case. And if the reason for the granting of certiorari in *Murphy-Moody* was in whole or in part the factor of possible collaboration between Federal and State crime-enforcement officers, then our case in this respect stands powerfully *a fortiori*. For in our case it was admitted by the Federal officials that they were invited by the State District Attorney's office to come and share the latter functionaries' alleged information concerning the petitioner; the petitioner was actually summoned before a Federal Grand Jury as a direct result of this; and when we tried to find out more about this in the instant contempt trial before Mr. Justice McDonald, we were blocked by that Court's ruling that the Federal officials' declination to reveal more about this situation would not be overborne, seemingly by reason of some conception of privilege or comity in relation to Federal official secrets. Nevertheless, although we were thus blocked from further inquiry concerning the Federal-State collaboration in our case, we were able to elicit the facts above described concerning the State "tip off" to the Federal men and the latter's use of this State information in a Federal Grand Jury interrogation of the petitioner in April, 1963. In the *Murphy-Moody* case, the indicia of Federal-State collaboration were persuasive but not nearly so manifest; they rested on the circumstance of the "waterfront" character of the crime-enforcement activities involved, all efforts by the *Murphy-Moody* petitioners to find out more about this having been thwarted by the refusal of the lower courts to allow the question to be explored at all by discovery procedures or otherwise (see the *Murphy-Moody* petition for certiorari at pp. 4, 16, 18, 21-22).

The specific Federal criminal statutes under which petitioner Powell might be incriminated if he were to answer questions of the type put to him by the State Grand Jury on October 21, 1963, include 18 U.S.C. § 201, the basic statute as to bribery of federal officers; 18 U.S.C. § 1010, which makes it a crime knowingly to utter any false statement "for the purpose of influencing in any way the action" of the Federal Housing Administration; and the Federal provisions with respect to conspiracy (18 U.S.C. § 371) and aiding and abetting (18 U.S.C. § 2).

The peril of Federal incrimination and prosecution to which petitioner has been subjected by the unilateral conferral of State immunity in this case is not effectively lessened, moreover, by the announcement of the sentencing Judge (in the contempt proceedings below) that the State grand jury evidence would not be permitted to be disclosed to any Federal grand jury without a court order (Sp. App., p. A-65). Aside from the fact that there is here no assurance, of course, against such a permissive court order one day being granted, what of the always vexing question of incriminatory "leads" which would obviously be available to zealous Federal police and prosecutive officials *via* their informal "contacts" with the State officialdom—and exactly this has already been happening in our case, as seen. A person in the position of petitioner Powell could be quite effectively victimized by such behind-the-scenes Federal-State collaboration on the level of investigative "leads", without the matter's ever having to reach the open formality or the judicial scrutiny of an attempt to submit to a Federal grand jury the State grand jury evidence which is supposedly being held under the protective monitoring of the State courts. Furthermore, what of the

incriminatory peril to petitioner Powell if his coerced State Grand Jury testimony were to result in an indictment for allegedly bribing building inspection officials, whereupon such testimony of Powell obviously would not and could not be saved from public disclosure?

Turning now to the question of the way in which the granting of certiorari in *Malloy* v. *Hogan* (No. 110) favors the granting of certiorari in our case, we respectfully refer the Court to the Petitioners' Brief (on the merits) in *Murphy-Moody* (No. 138), pp. 35-39, where it is pointed out that the granting of certiorari conjointly in *Malloy* and in *Murphy-Moody* indicates that the Court may be disposed at this time to undertake a fundamental reexamination of the doctrine of *Twining* v. *New Jersey*, 211 U.S. 78, which held that, notwithstanding the Fifth and Fourteenth Amendments, the States were free to compel self-incrimination. A ruling by this Court that the Fifth Amendment self-incrimination privilege applies to the States through the Fourteenth Amendment, taken together with an overruling of *Knapp* v. *Schweitzer* (*via* the *Murphy-Moody* certiorari), would import into the field of state inquisitional immunity the constitutional obligation to render any such conferral of state immunity equal in scope to the constitutional protection and privilege (the Federal Fifth Amendment) which is sought to be over-borne. Such a step by this Court would make the privilege against self-incrimination truly National in its effectiveness, and would once and for all eliminate the qualifications and the exceptions of decisional nicety which have had the "whipsawing" consequences upon individuals trapped in the Federal-State incrimination-and-immunity dilemma as noted in recent dissenting opinions in this Court. And since such a ruling

by this Court, which may be forthcoming from *Malloy* or *Murphy-Moody*, would also be dispositive of our case, it is submitted that thereby arises a further persuasive reason for the granting of certiorari in our case.

In view of the exhaustive briefing which is presently before this Court on the issues of the Federal-State incrimination problem in the *Malloy* and the *Murphy-Moody* cases, we refrain from burdening the Court and from lengthening this petition with any further rethreshing of the subject in its broad constitutional features; we especially refer the Court to Point I of the argument in the *Murphy-Moody* brief on the merits (pp. 34-62), and we respectfully adopt the discussion of the authorities and of the issues of constitutional policy there presented.

2. The overall unfairness, as a matter of due process of law, of the attempts by the State District Attorney to incriminate petitioner Powell and to jail him for contempt is intensified by the following: The proffered State immunity was constitutionally ineffectual in point of due process of law insofar as it failed to cover, or insofar as it obscured and confused, petitioner's privilege against self-incrimination with respect to the State charges of grand larceny and false pretenses under which he has been convicted and is presently prosecuting his State court appeal. The affidavit of Assistant District Attorney Koota in support of the contempt citation herein stated, in part, that "I advised the said witness that if his judgment of conviction were reversed by the Appellate Court, he would have immunity against further prosecution of the charge upon which he was convicted, but if the Appellate Court affirmed the conviction, the grant of immunity herein would not affect the judgment of conviction" (Sp. App., p. A-14).

We submit that the District Attorney's office has been playing cat-and-mouse with petitioner Powell in this entire matter of interrogating him about an area of alleged conduct as to a part of which he has already once been prosecuted and adjudged in a State criminal proceeding. Indeed, the District Attorney specifically interrogated Powell, in the State grand larceny and false pretenses trial, about whether he had paid bribes to building inspection officials, Powell denied any such payments, and the Trial Court in that prosecution instructed the Jury that Powell's denials were binding upon the District Attorney. See the printed Record on Appeal in *People* v. *Richard I. Powell and Donven Realty Corp.*, pp. 362-366, 370, presently pending in N.Y.S. Ct. App. Div. 2nd Dept. (Indictment No. 3048-1962). Is it due process of law, after a defendant in a criminal prosecution has successfully weathered an imputation of crime (bribery) collateral to the main criminal charge in the case (grand larceny and false pretenses), to drag that defendant on a later date before a Grand Jury in order to extort from him self-incriminating testimony on that same bribery charge, and to implement this compulsion by a supposed "immunity" which is expressly surrounded with a seemingly deliberate confusing and obscuring qualification as to how it will affect the subject matter of the criminal prosecution in question?

Aside from the bribery incrimination feature viewed in itself, the due process injustice strikes deeper:—We have earlier noted petitioner's experience in April, 1963, before a Federal Grand Jury to which the State officials "fed" him; and that he was called to testify by a prior State Grand Jury before the March 1963 trial of his grand larceny and false pretenses indictment. On this latter oc-

casion he was asked questions similar to those involved in the present contempt case, and he was excused by that Grand Jury after he invoked his privilege against self-incrimination (Sp. App., p. A-20). Nevertheless now, after he has suffered the full measure of the State-imposed jeopardy under that grand larceny and false pretenses indictment, and while he is prosecuting his appeal from the very judgment of conviction under that indictment, he is haled again before a State Grand Jury where he is subjected to questions which re-thresh, *pro tanto*, the very same ground of the criminal trial in which he was recently convicted and from which he is, right at this moment, seeking relief by an appeal (pending which he is in the due enjoyment of his right to continuing physical freedom under a duly granted state certificate of reasonable doubt). It is shocking, we submit, that a person who has just been convicted under criminal charges should thus be harrassingly hauled back into a criminal-inquisitional forum where, *pro tanto*, the same subject matter is involved. The judicial instinct against prosecutive outrage which this sort of inquisitorial harassment arouses in terms of constitutional due process—not to say outright violation of the privilege against self-incrimination in itself—finds expression in such decisions as *United States* v. *Miranti*, 253 F. 2d 135 (C.A. 2 1958); and *United States* v. *Chiarella*, 184 F. 2d 903 (C.A. 2 1950). It is pertinent to recall also the theme that issues looking to a defense akin to that of double jeopardy in a state prosecution for crime are cognizable under the Fourteenth Amendment due process clause on the basis of tests of the general fairness of state exercise of the power of criminal prosecution in such due process terms. See *Bartkus* v. *Illinois*, 359 U.S. 121,

127; *Palko* v. *Connecticut*, 302 U.S. 349; and the concurring opinion of Mr. Justice Frankfurter in *Brock* v. *North Carolina*, 344 U.S. 424, 429. In the *Bartkus* case, *supra*, the Court, citing the *Palko* case, *supra*, recognized that "at some point the cruelty of harrassment by multiple prosecution by a State would offend due process". In the *Brock* case, *supra*, Justice Frankfurter said (p. 429), "A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted * * * ".

It is therefore submitted that, in its overall impact upon the constitutional rights of the petitioner Powell, the instant effort to subject him to further Grand Jury interrogation constitutes an abuse of the inquisitional power of the Grand Jury which is of so unseemly and shocking a character as to amount to a denial of constitutional due process and to call for this Court's protective intercession.

3. As recited in our statement, *supra*, petitioner requested and was denied a jury trial of the charges of criminal contempt. At the time this is written the Court has not yet rendered its decision in the pending case of Governor Barnett of Mississippi (*United States* v. *Ross R. Barnett*, Oct. Term, 1963, No. 107). Our ensuing discussion of the jury trial question in the instant case of criminal contempt will please be read by the Court with this last-mentioned circumstance in mind.

In the *Barnett* case the historic issue of the right to jury trial in criminal contempt is being reexamined by the Court. The Court's undertaking of this re-examination indicates, of course, that *Green* v. *United States*, 356 U.S. 165, is not

necessarily dispositive of the question of whether a defendant in criminal contempt proceedings is constitutionally entitled to a jury trial. Moreover, the *Green* case dealt with Federal not State criminal contempt proceedings. This difference is not nominalistic. For it entitles us to point out that the Court has not considered the State-level question *de novo* since it first held some seventy five years ago, in *Eilenbecker* v. *District Court*, 134 U.S. 31, that the Federal Constitution does not require a jury trial in State prosecutions for criminal contempt. Indeed, as shown in the accompanying footnote*, in the few instances in which the Court has subsequently cited the *Eilenbecker* case, it has done so without new comment; and only two of those were state contempt cases, where, respectively, a jury had not been demanded (*Tinsley*), and an attorney was behaving defiantly *in facie curiae* and was convicted *instanter* (*Fisher*).

We therefore submit that the constitutional right of jury trial in criminal contempt should not have been denied to petitioner Powell in the instant proceeding; and that the issue presented by such denial merits the granting of certiorari.

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* *Eilenbecker* has been cited by this Court in *In Re Debs*, 158 U.S. 364, 596 (federal contempt); *Tinsley* v. *Anderson*, 171 U.S. 101, 108 (state contempt, jury trial not demanded); *Bessette* v. *W. B. Conkey Co.*, 194 U.S. 324, 337 (federal contempt); *United States* v. *Shipp*, 203 U.S. 563, 575 (contempt of Supreme Court, *Eilenbecker* cited for another point); *Myers* v. *United States*, 264 U.S. 95, 104 (federal contempt, *Eilenbecker* cited for another point); *Fisher* v. *Pace*, 336 U.S. 155, 159n. (state contempt, attorney disobeying court's limitation on argument); *Green* v. *United States*, *supra* (federal contempt). See also the dissenting opinions in *Bridges* v. *California*, 314 U.S. 252, 286 (state contempt, conviction reversed), and *United States* v. *United Mine Workers*, 330 U.S. 258, 367n. (federal contempt).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted. Petitioner also prays that the Court defer final action on this petition until the possible jurisdictional imperfection mentioned under our heading "Jurisdiction", *supra*—in regard to the still pending State Court appeal which petitioner has taken under a theory of appeal as of right—can be remedied, which is expected to be done in the very near future.

Respectfully submitted,

MAURICE EDELBAUM
Attorney for Petitioner
Richard I. Powell

Appendix A—Orders or Judgments Below

1. Order of Commitment for Criminal Contempt

(Printed in Separate Appendix, p. A-70)

2. Order of Affirmance by the Appellate Division, Second Department

(Printed in Separate Appendix, p. A-79)

3. "Opinion" of the Appellate Division, Second Department

(Printed in Separate Appendix, p. A-81)

4. Order of Court of Appeals Denying Leave to Appeal

(Printed in Separate Appendix, p. A-97)

Appendix B—Statutes

1. New York Judiciary Law, §750

§ 750. *Power of courts to punish for criminal contempts*

A. A court of record has power to punish for a criminal contempt, a person guilty of any of the following acts, and no others:

1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.

2. Breach of the peace, noise, or other disturbance, directly tending to interrupt its proceedings.

3. Wilful disobedience to its lawful mandate.

4. Resistance wilfully offered to its lawful mandate.

5. Contumacious and unlawful refusal to be sworn as a witness; or, after being sworn, to answer any legal and proper interrogatory.

6. Publication of a false, or grossly inaccurate report of its proceedings. But a court can not punish as a contempt, the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein.

7. Wilful failure to obey any mandate, process or notice issued pursuant to articles sixteen, seventeen, eighteen, eighteen-a or eighteen-b of the judiciary law, or to rules adopted pursuant thereto, or to any other statute relating thereto, or refusal to be sworn as provided therein. Applications to punish the accused for a contempt specified in this

subdivision may be made by notice of motion or by order to show cause, and shall be made returnable at the term of the supreme court at which contested motions are heard, or of the county court if the supreme court is not in session. As amended L.1954, c. 305, § 18; L.1955, c. 864; § 13, eff. July 1, 1955.

B. In addition to the power to punish for a criminal contempt as set forth in subdivision A, the supreme court has power under this section to punish for a criminal contempt any person who unlawfully practices or assumes to practice law; and a proceeding under this subdivision may be instituted on the court's own motion or on the motion of any officer charged with the duty of investigating or prosecuting unlawful practice of law, or by any bar association incorporated under the laws of this state.

C. A court not of record has only such power to punish for a criminal contempt as is specifically granted to it by statute and no other. As amended L.1937, c. 311, § 2; L.1940, c. 202, § 15; L.1943, c. 538; L.1947, c. 900, § 1, eff. Sept. 1, 1947.

2. New York Penal Law, §2447

§ 2447. *Witnesses' immunity*

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such

refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeitures for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may neverthless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him. Added L.1953, c. 891, § 1, eff. Sept. 1, 1953.